

BEFORE THE CHIEF PROCUREMENT OFFICER

In the Matter of Protest of:

DECISION

CASE No. 2009-155

Island Traditions of Hawaii, Inc.

Department of Corrections

POSTING DATE:

IFB No. 374014

Polo Shirts

January 11 , 2010

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Island Traditions of Hawaii (Island Traditions). With this invitation for bids (IFB), the Department of Corrections (DOC) attempts to procure short sleeve Polo shirts. In the letter, Island Traditions protested DOC's intent to award alleging, "Our official bid was chosen for the award, however the specifics involved in regards to the exact delivery date were the primary factor in our decision to reject the offer."

Due to the clarity of the matters before the CPO and the distance that Island Traditions would have to travel, this matter is being decided based upon an administrative review of the procurement file and various email correspondence with Robert Jackson, President of Island Traditions, without the benefit of a hearing.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On September 21, 2009, DOC issued the IFB.
2. On October 13, 2009, DOC issued Amendment no. 1.
3. On October 29, 2009, DOC opened the bids received.
4. On November 24, 2009, DOC posted an intent to award to Design Lab.
5. On December 7, 2009, Island Traditions submitted its protest to the CPO.

CONCLUSIONS OF LAW

Island Traditions was the apparent low bidder. As the apparent low bidder, Melissa Mims, DOC Procurement Officer, on November 18, 2009, engaged Mr. Jackson via an email to ask "I wanted to follow up with you about the short sleeve polo shirt bid. I need to verify that your cost includes the embroidery that we listed on page 7 of the original bid."¹

However, in an email dated November 18, 2009, Mr. Jackson wrote in a response to Ms. Mims:

"Unfortunately, I did make a HUGE error on my quote by omitting the embroidery. I would be willing to offer our \$14.00 quote (S-XL) for \$16.00 each (I'll absorb the extra \$1.00 for embroidery)

Therefore, my pricing on all items for the quote will increase \$2.00."

Ms. Mims might have rejected Island Traditions' bid at that point, as no amendments to bid price may be made after bid opening. [11-35-1520(7), "After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted."] But, on November 19, 2009, Ms. Mims responded, "We cannot accept any changes to

¹ Ms. Mims is reminded that clarifications cannot be used to make a non-responsive bid responsive. Nor is it an opportunity to ask whether a vendor accepts all terms and conditions. In order to conduct clarifications, a bid must be obviously responsive. Moreover, a bid must be responsive on its face, not after talking with a vendor. A procurement officer may approach a bidder after opening to inquire whether the bidder has made a mistake (an unintended error), and if so, provide the bidder an opportunity to request withdrawal, but the bid itself should provide a reason for making such an inquiry and such action must be done in compliance with Regulation 19-445.2085(A).

your bid. We can only accept what you have submitted” but she offered “We allow you to honor your prices or withdraw your bid.”

Mr. Jackson responded “We accept” (11/19/09) and expressed Island Traditions’ desire to “not withdraw.” (11/19/09)

On November 19, 2009, in an email, Mr. Jackson solicited Ms. Mims patience writing:

“I would agree to the terms, however per our conversation I still need to see the final pricing I put on the RFP. (I was traveling and didn’t make a copy for my records) Could someone email me this ASAP?”

Ms. Mims forwarded Island Tradition’s own pricing to Mr. Jackson and asked “After seeing your pricing. Do you accept all terms & conditions?”

On November 20, 2009, Mr. Jackson emailed the following response to Ms. Mims:

“I could still accept the price which was submitted, but only in 2010. We are not sure when a PO will be issued: We cannot accept any orders of this magnitude until January 2010. December is our busy season and the time constraints would not allow for guaranteed delivery.

Also, we are unsure what the payments terms are in the contract.”

The IFB specified, “DELIVERY DATE - Purchase Order (JAN 2006): All items shall be delivered within **THIRTY (30)** days after receipt of purchase order.” [IFB, p. 8] Appropriately, Ms. Mims advised Mr. Jackson that she could not guarantee that SCDC would not issue a PO before January 1.

Mr. Jackson advised Ms. Mims in an email on November 20, 2009, “I’m afraid we will have to pass on the RFP due to the fact that we can’t guarantee any delivery during December or early January.”

Regarding award of an IFB, the Consolidated Procurement Code requires, “notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets

the requirements set forth in the invitation for bids must be given.” [11-35-1520(10)] The Code defines a responsive bidder as, “a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.” [11-35-1410(7)]

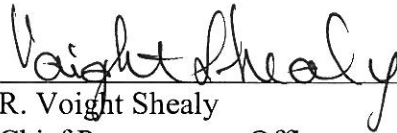
When offered the award in accordance with the IFB’s requirements for delivery of 30 days ARO (After Receipt of Order), Mr. Jackson refused the award. DOC did not determine Island Traditions nonresponsive, due to Mr. Jackson withdrawing Island Traditions’ bid, but clearly Island Traditions was not responsive to the delivery requirements of the IFB. Therefore, Island Traditions could not receive the award under the law. Regardless, Mr. Jackson declined to honor his bid and accept the contract.

DETERMINATION

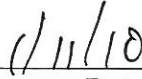
This solicitation required delivery within 30 days ARO. (IFB, p. 8) Further, the invitation clearly announced on the cover page that SCDC expected to award the contract on October 22, 2009. Amendment # 1 altered the SCDC anticipated award date from October 22, 2009 to November 5, 2009; again announcing that fact of the cover page. By submitting a bid, Island Traditions accepted the terms of the invitation for bids, which required delivery within 30 days of November 5, 2009.

Mr. Mims of DOC offered Island Traditions the award in accordance with the requirements of the IFB. Mr. Jackson of Island Traditions very clearly refused to accept the award and perform as required by the IFB. Ms. Mims had every right to reject Island Traditions’ bid for attempting to qualify its delivery in a fashion not allowed by the invitation. (SC Reg. 19-445.2065) Island Traditions was given ample opportunity to receive the award in accordance with the requirements of the IFB, but Island Traditions refused the award.

Protest dismissed.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2009-2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 23, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

Island Traditions

OF HAWAII, INC.

Chief Procurement Officer,
Materials Management Office
South Carolina Dept. of Corrections

December 6, 2009

To Whom It May Concern:

We wish to protest Solicitation # 374014 and request a re-examination of our official bid which was **\$4,629 LOWER** than the bid which was awarded. (**\$23,145 Potential Amount over 5 years**)

I will be forwarding - in a separate email, our correspondence with Ms. Melissa Mims which outlines the events and discussions pertaining to the bid. Our official bid was chosen for the award, however the specifics involved in regards to the exact delivery date were the primary factor in our decision to reject the offer. Please also note our products which were quoted are the EXACT SAME ITEM AND BRAND as the Chosen Award Winner.

As stated in our correspondence, we could not guarantee a delivery "within 30 days" if the P.O. for the award was issued in the first week of December. Shipping and embroidery lead times had to be extended due to the Christmas - New Year Holiday season.

Since we were not provided specific dates for the order, we could not accept anything other than a Mid-January delivery date as the soonest.

We ask that your office reconsider our bid, the circumstances, and the SUBSTANTIAL IMMEDIATE COST SAVINGS your department and State would incur by allowing a Mid-January (earliest) delivery date.

I'm confident the State of South Carolina Taxpayers would appreciate the savings realized for just a 21-day delay in the shirt delivery.

You may contact me directly at (808)845-6677 (office), or cell (808)371-2323 to discuss our protest further. Thank you for your consideration.

Respectively Yours,

Robert L Jackson

Robert L. Jackson
President
Island Traditions of Hawaii, Inc.